

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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In the Matter of )

)  
Review of Regulatory Requirements for )  
Incumbent LEC Broadband )  
Telecommunications Services )

CC Docket No. 01-337

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**REPLY COMMENTS OF AOL TIME WARNER INC.**

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**REPLY COMMENTS OF AOL TIME WARNER, INC.**

AOL Time Warner Inc., by its attorneys, files these Reply Comments in the above-captioned rulemaking proceeding designed to examine the regulatory requirements for incumbent local exchange carriers ("ILECs") providing domestic broadband telecommunications services.<sup>1</sup> As set forth herein, AOL Time Warner urges the Federal Communications Commission ("FCC" or "Commission") to continue to foster consumer choice and Internet Service Provider ("ISP") competition as it assesses ILEC regulatory obligations and deregulatory proposals for ILEC broadband telecommunications services.

**INTRODUCTION AND SUMMARY**

Through its unique combination of brands and other assets, AOL Time Warner provides consumers subscription services, commerce, and content through a diversity of media.<sup>2</sup> AOL Time Warner has an interest in the instant NPRM because a part of the AOL Time Warner mission is to ensure that consumers can access the products and features of America Online, Inc. ("AOL"), which include an array of interactive services, Web brands, Internet technologies and

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<sup>1</sup> Notice of Proposed Rulemaking, CC Docket 01-337, FCC # 01-360, rel. December 20, 2001 ("NPRM").

<sup>2</sup> AOL Time Warner is the world's first Internet-powered media and communications company, whose industry-leading businesses include interactive services, cable systems, publishing, music, networks and filmed entertainment.

e-commerce services, are ubiquitously available to American consumers.<sup>3</sup> Today, AOL products and features are accessed overwhelmingly through the facilities and services of the ILECs, and increasingly, high-speed features are accessed via ILEC broadband telecommunications inputs. Consumers using the high-speed services of AOL can enjoy streaming video, audio and download features, such as AOL High Speed Radio (continuous, CD-quality music in a variety of genres created especially for High Speed broadband users), a dynamic mix of constantly updated content of news, sports, weather and business/personal finance audio and video, and the latest movie trailers and music videos. As high-speed facilities are deployed throughout the United States, AOL Time Warner is committed to developing applications and features that meet consumer needs and spark interest in and demand for broadband-based services by bringing consumers all the best that broadband has to offer. Indeed, substantial investments by ISPs and others have been predicated on the assumption that FCC policy would continue to ensure unimpeded consumer access to emerging applications and services.

The NPRM raises many issues regarding the “broadband” definition most appropriate for FCC consideration in evaluating the appropriate regulatory framework for ILECs. In these Reply Comments, AOL Time Warner focuses on high-speed DSL services obtained by ISPs and used as a component of DSL-based Internet access service offered to residential consumers. To its credit, the FCC has successfully created a regulatory environment that ensures all ISPs – whether independent or carrier-affiliated – are afforded access to telecommunications inputs provided by ILECs on non-discriminatory rates, terms and conditions. As a result, consumers

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<sup>3</sup> These include AOL, an Internet access service with more than 34 million members, and CompuServe, with more than 3 million members, the company's two worldwide Internet services; several leading Internet brands including ICQ, AOL Instant Messenger and MapQuest; the AOL Anywhere.com and Netscape.com portals; the Netscape 6, Netscape Navigator and Communicator browsers; AOL Moviefone, the nation's No. 1 movie-listing guide and  
*(footnote continued)*

choose from a diversity of ISPs that offer DSL-based Internet access services, analogous to the choices that exist for narrowband Internet access. As broadband-based applications and services become more ubiquitous, the FCC should ensure that its regulatory framework continues to encourage ISP competition, allowing consumers to choose the ISPs that meet their preferences.

The ILECs' broadband telecommunications services are today a vital foundation enabling consumers to access the diverse high-speed information service capabilities offered by AOL and other ISPs, including ILEC-affiliated ISPs. As the FCC has recognized, ILECs offer bulk wholesale DSL services to ISPs and the ISPs "package the DSL service with their Internet service to offer affordable high-speed access to the Internet to residential and business consumers."<sup>4</sup> AOL and other ISPs perform marketing, billing, and customer care functions for residential consumers that purchase DSL-based Internet access, consistent with the ISPs' role as ILECs' customers for wholesale DSL service (and related advanced telecommunications transport services such as Frame Relay and ATM). Indeed, with only a few exceptions, none of the former Bell Operating Companies ("BOCs") offer stand-alone DSL services to consumers. Instead, ILECs offer consumers DSL-based Internet access through their affiliated ISPs.<sup>5</sup> As Commissioner Abernathy has noted:

Before merging with Ameritech in 1999, SWBT sold a DSL transport service directly to residential customers at retail. . . . Following the merger, ASI [SBC's advanced services affiliate] decided to cease providing a DSL

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ticketing service; AOL@School, a free online learning tool for K-12 classrooms; and Spinner, Winamp and SHOUTcast, leaders in Internet music.

<sup>4</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability, Second Report and Order*, CC Docket 98-147, FCC # 99-330, at ¶¶ 3,6-7 ("Advanced Services Second Report and Order").

<sup>5</sup> See, e.g., *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Arkansas and Missouri*, CC Docket No. 01-194, *Memorandum Opinion and Order*, 16 FCC Rcd 20719, ¶ 84 (2001).

transport service directly to end users as a stand-alone service, and to focus instead on the wholesale provision of DSL transport to ISPs (including its affiliated ISP).<sup>6</sup>

In short, residential consumers obtain retail broadband Internet access services through their chosen ISPs, not from the ILECs.

Even in the few years that broadband capabilities have been deployed by the ILECs, experience has demonstrated that this market reality – where residential consumers acquire retail DSL-based Internet access from a diversity of ISPs – has served well the FCC’s goals of innovation, investment and competition. As the FCC considers changes in the regulatory landscape for incumbent telephone companies, it should retain core requirements that afford all ISPs fair and full access to critical services used to provide consumers retail DSL-based Internet access. Experience has shown that competition and choice will maximize diversity and innovation in Internet applications for consumers, stimulate growth, and minimize the need for unduly intrusive government regulation.

At the same time, AOL Time Warner recognizes that the broadband topography is not static and that some regulatory adjustments may well serve the public interest. Certainly, over three decades ago when the FCC embarked on its seminal *Computer Inquiries*,<sup>7</sup> the FCC did not contemplate the specific evolution of the ILECs’ DSL services or other technological developments, nor did it (or could it) predict the competitive environment envisioned by the Telecommunications Act of 1996 (“1996 Act”). Accordingly, it is appropriate for the FCC to

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<sup>6</sup> Separate Statement of Commissioner Kathleen Q. Abernathy at 1-2 n.2 (citing SBC Arkansas/Missouri Section 271 Application at 51-52).

<sup>7</sup> See, e.g., *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities*, Final Decision and Order, 28 FCC 2d 267 (1971) (“Computer I”); *Amendment of Section 64.702 of the Commission’s Rules and Regulations* (“Computer II”), Final Decision, 77 FCC 2d 384 (1980); *Amendment of Section 64.702 of the Commission’s Rules and Regulations* (“Computer III”), CC Docket No. 85-229, Report and Order, 104 FCC 2d 958 (1986) (subsequent histories omitted).

consider updating its requirements to adjust for the current state of broadband competition, with an eye to reducing regulation as competition emerges. In particular, the FCC should consider streamlining and/or eliminating requirements that are either inapplicable in today's environment or, as importantly, requirements that do not achieve their stated goals in an efficient, effective manner. These changes could include streamlining the tariff process, eliminating and/or restructuring CEI and ONA obligations, and better tailoring to broadband services requirements designed to foster information services competition. Moreover, to promote competition, compliance and redress, the FCC should enhance its enforcement processes so that it may substitute as much as possible enforcement for prescriptive regulation.

## **I. SUBSTANTIAL CONSUMER BENEFITS FLOW FROM TODAY'S REGULATORY FRAMEWORK**

As many commenting parties have noted, consumer welfare should be the guiding principle for the FCC's decision making in this and related "broadband" proceedings.<sup>8</sup> While competition, investment, innovation and high-speed facilities deployment are all legitimate goals, they are only of value insofar as they enhance consumer well-being. In the context of "broadband services," then, it is essential to understand how the FCC's regulatory framework impacts consumers to assess meaningfully appropriate regulatory requirements.

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<sup>8</sup> See, e.g., DirecTV Broadband Comments at 7-8; Public Service Commission of Wisconsin Comments at 4; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Notice of Proposed Rulemaking, FCC 001-361 at ¶4 (rel. Dec. 20, 2001) ("UNE Triennial Review NPRM"). Indeed, consumer welfare correctly has been the guidepost for the FCC in the long line of precedent cited by the FCC supporting streamlined regulation in increasingly competitive markets. See NPRM at ¶¶9-12; see also, e.g., *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, First Report and Order, 85 FCC 2d 1 at ¶ 9 (1980); *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880 at ¶ 1 (1991); *Motion of AT&T to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271 at ¶168 (1995); *Access Charge Reform*, CC Docket No. 96-262, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 at ¶¶ 3, 18 (1999) ("Pricing Flexibility Order") (citing *Access Charge Reform*, CC Docket No. 96-262, Notice of Proposed Rulemaking, 11 FCC Rcd 21354, 21440-41 (1996)).

Today, residential consumers acquire DSL-based Internet access services directly from their ISPs, whether the ISP is affiliated with the provider of the underlying DSL telecommunications services (e.g., Verizon.net affiliated with Verizon or Prodigy Communications affiliated with SBC) or unaffiliated (including AOL, EarthLink, MSN or the myriad of independent ISPs). As such, consumers select their DSL-based ISP according to their particular preferences or needs, such as the ISP's "look and feel," rates and pricing plans, email functionality, child safety and access software, specialized content, group affiliation, applications and related features, and customer care functions. Just as in the narrowband context, this diversity of ISPs has been an enormous success, stimulating Internet usage,<sup>9</sup> spurring innovation,<sup>10</sup> and driving economic productivity.<sup>11</sup> Taken as a whole, this framework maximizes consumer welfare.

The FCC has appropriately and consistently characterized the offerings of ISPs as "information services," concluding that Internet access and related services and products are and should be unregulated.<sup>12</sup> Correctly, *all* DSL-based ISPs, even those affiliated with the BOCs,

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<sup>9</sup> See Advanced Services Second Report and Order at ¶¶ 3, 20; Jason Oxman, *The Commission and the Unregulation of the Internet*, OPP Working Paper Series No. 31, July 1999 at 5, 17 ("OPP Working Paper No. 31").

<sup>10</sup> See, e.g., Leslie Miller, *Innovations Abound at Internet World*, USA Today, Jan. 26, 1999, available at <http://www.usatoday.com/life/cyber/tech/ctb784.html> (describing AOL-pioneered innovations such as instant message and buddy list features and checking AOL mail via the Web; also describing how "[c]ompetition among search engine companies such as Lycos, Hotbot and InfoSeek" led to creation of a software called ZurfRider, which uses artificial intelligence to reduce search time, querying many top search sites at once). Notably, ISPs have legitimately relied upon FCC policies in their investment decisions. See e.g., *National Ass'n. of Independent Television Producers and Distributors v. FCC*, 502 F.2d 249, 254 (2d Cir. 1974) (reasonable reliance upon FCC rule is entitled to weight).

<sup>11</sup> See e.g., U.S. Department of Commerce, Economics and Statistics Administration, "Digital Economy 2002" (describing economic growth from Information Technology industry including software/services industries).

<sup>12</sup> See, e.g., *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, ¶¶ 73-82 (1998) ("Universal Service Report"); Advanced Services Second Report and Order at ¶¶ 3, 14, 20. AOL Time Warner recognizes that the FCC has extant proceedings considering the scope of services that are deemed "information services." See *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket No. 02-33, Notice of Proposed Rulemaking, rel. March 22, 2002 ("Wireline Broadband Services NPRM"); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other* (footnote continued)

that provide consumers retail DSL-based Internet access services remain unregulated, competing vigorously, outside of Title II requirements. Notably, a major reason why retail Internet access services are so competitive today is that the FCC successfully created a regulatory environment that ensures unaffiliated ISPs access to telecommunications components at nondiscriminatory prices, terms and conditions.<sup>13</sup>

As the record demonstrates, and the FCC has repeatedly noted, to provide consumers with DSL-based Internet access and other high-speed services, ISPs today acquire wholesale DSL telecommunications service inputs under tariff.<sup>14</sup> Contrary to ILEC assertions, there is no “mass market” for stand-alone DSL transmission services for residential consumers. Instead, ISPs are the consumers of these wholesale services, which are predominantly provided by the ILECs.<sup>15</sup> In fact, FCC data shows that the ILECs provide over 90% of DSL transmission services.<sup>16</sup> ISPs present consumers with an accessible, ready-to-use retail DSL-based Internet

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*Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52 and GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77 (rel. Mar. 15, 2002). Here, AOL Time Warner addresses only those services the FCC has already concluded are definitively within this statutory classification. See, e.g., *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended; 1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, CC Docket Nos. 96-61 and 98-183, Report and Order, 16 FCC Rcd 7418 at ¶ 2 (2001) (“CPE/Enhanced Services Unbundling Order”); Universal Service Report at ¶¶ 73-82.

<sup>13</sup> See CPE/Enhanced Services Unbundling Order at ¶ 26; Advanced Services Second Report and Order at ¶ 21; OPP Working Paper No. 31 at 8-12.

<sup>14</sup> See BellSouth Telecommunications, Inc. Tariff F.C.C. No. 1 at § 7, ¶ 7.2.17; Qwest Corporation Tariff F.C.C. No. 1 at § 8, ¶ 8.4.4; SBC Advanced Solutions Inc., Tariff F.C.C. No. 1 at § 6 (“Wholesale Digital Subscriber Line Transport”); Verizon Telephone Companies Tariff F.C.C. No. 20 at § 5, Part III (offering volume and term discount plans). See also Advanced Services Second Report and Order at ¶ 7; DirecTV Broadband Comments at 2-5; EarthLink Comments at 2-3, 5, 7-9, 22-24; Information Technology Association of America Comments at 26.

<sup>15</sup> Notably, in other contexts, the ILECs themselves recognize this clear arrangement. See e.g., *Qwest Corporation Petition for Declaratory Ruling Concerning Wholesale DSL Services and Section 251(c)(4) of the Act*, WC Docket No. 02-77, filed April 3, 2002 and supporting Affidavit of Vice President Steven K. Starliper.

<sup>16</sup> See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, CC Docket No. 98-146, Third Report, FCC 02-33 at ¶ 51 (rel. Feb. 6, 2002) (“Third Section 706 Report”).

access product by combining these “bulk” or “wholesale” DSL inputs, together with required ATM or Frame Relay “backhaul” services, and ISP-provided content, marketing, customer care and information services and applications. Thus, the Commission should reject the “market” as defined by the ILECs as they ignore the realities of how consumers receive broadband today.<sup>17</sup>

To assess ILEC “market power” and whether to declare the ILECs “non-dominant,” the Commission cannot ignore the fact that today, the ILECs are virtually the only suppliers of wholesale wireline high-speed (DSL) services.<sup>18</sup> Not only do they have the potential to engage in anticompetitive conduct, such as by raising rates, changing terms and interfering with the ISP-consumer relationship, there have been numerous instances that raise legitimate concerns that they have in fact already done so.<sup>19</sup>

Accordingly, the FCC should ensure that wholesale DSL inputs continue to be available to all ISPs if the Commission is to enhance consumer benefits through the retention and promotion of today’s competitive landscape, and maintain a business atmosphere where

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<sup>17</sup> See e.g., Comments of SBC Communications Inc. at 8-9, 13-14, 18-29, 66; Comments of Verizon Inc. at 5-6, 11-22; Comments of BellSouth Inc. at 30, 32-39, 43-44, 48-49; Comments of Qwest Inc. at 10-24.

<sup>18</sup> While the ILECs make much of cable as a competitor in the “mass-market,” (see, e.g., SBC Comments at 21 and Verizon Comments at 15-16; SBC Petition for Expedited Ruling that it is Non-Dominant in its Provision of Advanced Services and for Forbearance from Dominant Carrier Regulation of Those Services, at 25-28 and Declaration of Robert W. Crandall and J. Gregory Sidak (filed Oct. 3, 2001)), the facts show that cable operators do not offer high-speed transmission services to ISPs. See Letter from Steven N. Teplitz, Vice President and Associate General Counsel for Communications Policy and Regulatory Affairs, AOL Time Warner, to Royce Sherlock, Deputy Chief, Policy and Rules Division, Cable Services Bureau, Federal Communications Commission, GN Docket No. 00-185 (Jan. 22, 2002) (explaining that Time Warner Cable partners with affiliated and unaffiliated ISPs to offer jointly an information service to end-users, but does not sell wholesale transmission services to ISPs).

<sup>19</sup> See e.g., *California ISP Association v. Pacific Bell Telephone Co.*, Case No. 01-07-027, before the California Public Utilities Commission (filed July 25, 2001); *SBC Communications, Inc., Apparent Liability for Forfeiture, Notice of Apparent Liability for Forfeiture*, 16 FCC Rcd 19370 (2001); *In the Matter of SBC Communications, Inc. Apparent Liability for Forfeiture, Forfeiture Order*, File No. EB-01-IH-0642, FCC No. 02-112, Rel. April 15, 2002 (referencing possible discrimination by SBC in the provisioning and maintenance of DSL technology); CompTel Comments at 6-8, DirecTV Broadband Comments at 8-12, EarthLink Comments at 23-25; WorldCom Comments at 18-20, 29-31. See also, e.g., Comments of the American ISP Association in CC Docket No. 98-10 (*Computer III Refresh*) at 6-14 (filed Apr. 16, 2001); Initial Comments of the California ISP Association, Inc. in CC Docket No. 98-10, at 10-29 (filed Apr. 16, 2001).

innovation, creativity and technological advances are fostered. AOL Time Warner urges the FCC to examine and consider carefully the potential impact on consumers if it were to conclude that ISPs should no longer be afforded access to DSL high-speed transport service on a just, reasonable and non-discriminatory basis. In fact, as the FCC puzzles over what is “unknown about consumer demand,”<sup>20</sup> it should recognize that the nation’s diverse ISPs – as the point of contact for broadband consumers – have the greatest incentive and ability to discover and satisfy consumer demand.

## **II. DECLARING ILECS “NON-DOMINANT” IN THEIR PROVISION OF WHOLESALE TRANSMISSION INPUTS WOULD REDUCE CONSUMER CHOICE AND COMPETITION**

AOL Time Warner agrees that the FCC should foster the development of competitive markets.<sup>21</sup> AOL Time Warner submits that the best and fastest way to achieve this objective is to promote, not restrict, consumer choice. As such, the Commission should retain requirements that mandate full and fair ISP competition, allowing unaffiliated ISPs to access telecommunications services and components on the same rates, terms and conditions as do ILEC-affiliated ISPs. The goal of a flourishing and competitive information services arena – which originally drove the FCC to adopt this core obligation – is no less vital today.

In a nutshell, the ILECs argue that they are not “dominant,”<sup>22</sup> because they assert that in the broadband “mass-market,” which is “nationwide,” cable modem providers have the lion’s share of the customers, which by some ILEC calculations exceeds two thirds of the market.<sup>23</sup>

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<sup>20</sup> NPRM at ¶4.

<sup>21</sup> NPRM at ¶ 7.

<sup>22</sup> 47 C.F.R. § 61.3(q) (defining “dominant carrier” as a “carrier found by the Commission to have market power (i.e., power to control prices)”).

<sup>23</sup> SBC Comments at 36. *See also* Qwest Comments at 11, 24-33, 44; Verizon Comments at 13-24.

The facts show that the ILECs compare apples-to-oranges by mischaracterizing the true nature of the services that are being acquired by mass-market consumers. As described above, consumers acquire high-speed Internet access services from ISPs, not from the ILECs. Thus, it is irrelevant to an assessment of ILEC market power in wholesale high-speed (DSL) services to consider the relative market share of information service providers, including cable-based information services. Instead, the FCC must consider the indisputable facts – today, the ILECs offer the overwhelming share of wholesale broadband transmission services, reported by the FCC to be over 90%.<sup>24</sup>

Neither does the presence of competitive local exchange carriers (“CLECs”) alter this conclusion. Certainly, the 1996 Act and FCC rules are intended to promote the availability of advanced service alternatives from CLECs.<sup>25</sup> Further, the FCC is now considering additional measures to enhance the ability of CLECs to offer competitive services in an efficient, reliable and cost-effective manner, including special access and UNE performance metrics.<sup>26</sup> CLECs

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<sup>24</sup> See Third Section 706 Report at ¶ 51. Moreover, the ILECs have presented no credible evidence as to how the existence of requirements developed in the *Computer Inquiries* have hindered their ability to deploy broadband facilities or offer services; the data would suggest that rather than being hindered, they have been quite successful. See, e.g., Qwest 2001 Annual Report at 36, available at <http://www.qwest.com/about/investor> (“Qwest offers a broad range of products and services to transport voice, data and video telecommunications that use evolving transport methods that optimize Qwest’s existing network and incorporate Internet protocol (“IP”) technology. This technology lowers costs and increases transmission speeds. Qwest believes that these services and products will be a key component of its overall growth”).

<sup>25</sup> See 47 C.F.R. §§ 51.307(c), 51.309(a), 51.319(h); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket 98-147, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912 (1999); Third Report and Order on Reconsideration in CC Docket No. 98-147 and Fourth Report and Order on Reconsideration in CC Docket No. 96-98, 16 FCC Rcd 2101 (2001).

<sup>26</sup> See *Performance Measurements and Standards for Interstate Special Access Services*, CC Docket No. 01-321, Notice of Proposed Rulemaking, 16 FCC Rcd 20896 (2001) (“Special Access Performance Measurements NPRM”); *Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, CC Docket No. 01-318, Notice of Proposed Rulemaking, 16 FCC Rcd 20641 (2001). See also Comments of the Ad Hoc Telecommunications Users Committee in CC Docket No. 01-321, at 6; Comments of ASCENT in CC Docket No. 01-321, at 3; Comments of CompTel in CC Docket No. 01-321, at 5; Comments of Allegiance Telecommunications, Inc. in CC Docket No. 01-318, at 9-25; and Comments of ALTS in CC Docket No. 01-318, at 5-7.

provide, however, only a fraction of the wholesale DSL services acquired by ISPs. And more importantly, CLECs do not typically offer the ubiquitous services that a national or regional ISP must have to provide services to its entire consumer base. Moreover, as has been widely-reported, the financial health and sustainability of the data CLECs is uncertain at best, especially as the FCC considers eliminating the unbundling requirements that afford CLECs access to the high-frequency portion of the local loop.<sup>27</sup> Likewise, other cited “alternatives,” such as terrestrial and mobile wireless, Fiber-To-The-Home (“FTTH”), and satellite services, while offering significant potential for increased availability in the future, are not today viable options as a factual matter.<sup>28</sup> And, while the ILECs make much of “cable modem services,” cable is not in the business of offering either wholesale or retail advanced services transmission to ISPs.<sup>29</sup>

To assess whether an entity is “non-dominant,” it is necessary to examine actual competition not the mere opportunity for competition contingent upon future market or technological conditions that may not materialize.<sup>30</sup> Indeed, in an analogous context, when the FCC was faced with BOC requests for pricing flexibility in the form of forbearance from dominant carrier regulation, the FCC adopted rules that made clear that relief would be predicated on specific competitive showings, including a requirement that ILECs “demonstrate

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<sup>27</sup> See UNE Triennial Review NPRM at ¶¶ 53-54; Tom Nolle, *Competition, Monopoly, and Progress – Who’s to Blame for Slow Broadband Progress? Everybody and Nobody*, Network Magazine, Feb. 1, 2002, at 96; Network World, *The DLECs’ Demise* (Jan. 7, 2002), available at <http://www.nwfusion.com/research/2002/0107feat.html>.

<sup>28</sup> See e.g., ALTS Comments at 5; DirecTV Broadband Comments at 5-7; Comments of DSLNET Communications, Focal Communications and Pac-West Telecomm at 10-12; ITAA Comments at 14-15; WorldCom Comments at 12-13, Attachment A, Declaration of Daniel Kelley at 7-9.

<sup>29</sup> See fn. 18, *supra*.

<sup>30</sup> See *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area*, CC Docket Nos. 96-149 and 96-61, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756 at ¶¶ 96-97 (1997); US LEC Comments at 7-8, 15-19; WorldCom Comments at 17-18.

that competitors have established a significant market presence.”<sup>31</sup> While AOL Time Warner is hopeful that there will one day be sufficient competition to preclude the ILECs from exercising market power by raising rates, imposing unreasonable or discriminatory terms and conditions and engaging in other anticompetitive conduct that impedes the ability of independent ISPs to compete fairly with ILEC-affiliated ISPs for retail Internet access customers, the facts show it simply does not exist today.<sup>32</sup>

Under these circumstances, if the FCC were to eliminate the core obligations that emanate from the ILECs’ dominant status, including “equal access” as to the rates, terms and conditions of service, it would not unleash additional broadband competition.<sup>33</sup> To the contrary, consumers would be faced with reduced choice that would, over time, constrict service offerings, reduce innovation and likely suppress demand. Instead of the array of ISPs that exist today – that cater to niche markets and the diverse desires and needs of our citizenry – choice would almost certainly be diminished as unaffiliated ISPs found themselves unable to utilize the telecommunications inputs needed to provide DSL-based Internet access on terms equal to those afforded to affiliated ISPs. For this reason, AOL Time Warner asserts that the FCC should reject ILEC reclassification at this time and continue its sound policy of promoting intra-modal competition among ISPs that rely upon ILEC high-speed services.<sup>34</sup> Today, consumer choice

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<sup>31</sup> Pricing Flexibility Order at ¶¶ 19, 24-26.

<sup>32</sup> In fact, even with today’s dominant carrier requirements there have been serious issues raised regarding the ILECs’ ability to dictate unreasonable terms to their ISP customers, such as terms that would require ISPs to accept degraded DSL services, full waivers of liability even for actions within the ILECs’ control and similar egregious provisions. *See, e.g.,* Letter of EarthLink, Inc., Competitive Telecommunications Association, U.S. Internet Service Providers Alliance, and Virginia ISP Alliance to Chairman Michael Powell, Federal Communications Commission (filed Sep. 17, 2001) (objecting to numerous provisions of SBC-ASI Advanced Services Tariff FCC No. 1).

<sup>33</sup> Notably, just last year, the FCC stressed the importance of its rules and safeguards in ensuring that ILECs that offer bundles of information and transmission services do not act in an anticompetitive manner. *See CPE/Enhanced Services Unbundling Order* at ¶¶ 44-45 (2001).

<sup>34</sup> *See NPRM* at ¶¶ 31, 34, 45; Advanced Services Second Report and Order at ¶ 18.

reigns. And, as the FCC explores an appropriate regulatory regime for the future, it should take no action that would undermine the multiplicity of broadband ISPs available today.

**III. THE FCC SHOULD UPDATE ITS REGULATORY FRAMEWORK BY  
STREAMLINING AND MODERNIZING ILEC BROADBAND  
REGULATION TO PROMOTE COMPETITION AND CHOICE**

Although the record indicates that the core ILEC dominant carrier obligation that requires ILECs to afford all ISPs access to needed telecommunications inputs on nondiscriminatory rates, terms and conditions should not be eliminated at this time, AOL Time Warner recognizes that broadband services may present issues that can best be addressed by updating particular FCC safeguards, including by streamlining and/or eliminating rules that are not well-suited to today's environment. Two areas of concern should be addressed through any regulatory regime: first, the ability of the ILECs to engage in anticompetitive pricing, and second, the ability of the ILECs to discriminate unlawfully.

Significantly, the FCC should view competitive developments in the broadband arena as an opportunity to shift its regulatory emphasis from prescriptive regulation to enforcement. Specifically, the FCC should examine its approach to enforcement to streamline the process of regulation while increasing its efficiency. Today, even with the Accelerated Docket, the enforcement process is daunting. Bringing a complaint requires not only a substantial resource commitment, but also information about ILEC practices that an ISP is not privy to, such as information as to how the ILEC treats affiliated ISPs, its cost structure and other information. As a start, the FCC should consider establishing an enforcement process that accounts for the information disparity, including specific requirements on the timing and scope of discovery. Likewise, the FCC should adopt specific and verifiable requirements, such as the proposed

special access performance metrics,<sup>35</sup> to allow the FCC to reach liability finding easily and efficiently.

The FCC should also consider adjusting the relative evidentiary burdens by shifting the burden to the carrier to demonstrate non-discrimination if a threshold showing is made by an ISP based upon data that must be provided by an ILEC (especially on critical issues such as OSS, provisioning, maintenance, and repair). This should also be accompanied by a system of mandated penalties or liquidated damages to the prevailing ISPs. Further, the FCC might consider streamlining requirements regarding tariffs (e.g., to provide for web-posting and a rapid, post-effective review process in lieu of the pre-effective review) or eliminating ineffectual or redundant obligations that emanate from *Computer III*, especially insofar as ONA and CEI requirements were not promulgated in the context of broadband services. While AOL Time Warner recognizes that the FCC will be considering issues relevant to the *Computer Inquiries* in its companion proceeding on Wireline Broadband issues,<sup>36</sup> it offers these suggestions to underscore that the FCC should seek to minimize intrusive regulation where possible and create a regulatory structure that diminishes as competition increases.

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<sup>35</sup> Significantly, some parties in the Special Access Performance Measurements NPRM proceeding already have urged the FCC to conclude that the metrics also should apply to DSL services. See e.g., Comments of DirecTV Broadband in CC Docket No. 01-321 at 2-6, 9-13; Reply Comments of EarthLink in CC Docket No. 01-321 at 5-8. DSL services are a type of special access according to FCC precedent. See, e.g., *GTE Telephone Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148, Memorandum Opinion and Order*, 13 FCC Rcd 22466 (1998); *Deployment of Wireline Service Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Order on Remand, 15 FCC Rcd 385 at ¶ 45 (1999), *reversed and remanded on other grounds, WorldCom v. FCC*, Case No. 00-1002 (D.C. Cir. rel. Apr. 20, 2001). See also Pricing Flexibility Order at ¶ 39 (noting “special access tariffs such as the GTE DSL tariff”).

<sup>36</sup> See Wireline Broadband NPRM at ¶¶ 31-52.

## **CONCLUSION**

Today's regulatory framework has been successful in creating for consumers competition in Internet access services because ILECs must provide all ISPs – whether affiliated or independent – high-speed DSL telecommunications services in a nondiscriminatory manner. For the reasons set forth above, the FCC should not conclude that the ILECs are “non-dominant” in their provision of wholesale DSL services, which would only serve to undermine consumer choice, reduce competition and undercut incentives for innovation and improved service quality.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Donna N. Lampert', written over a horizontal line.

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Certificate of Service

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